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No. 04-____

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In the Supreme Court of the United States

SEAN PATRICK MICKLIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the use of judicial findings to enhance the Petitioner's sentence eight to twelve-fold violated the Petitioner's Sixth Amendment rights to a jury? This Petition presents the same issue as recently addressed by this Court in *Blakely v. Washington*, 124 S.Ct. 2531 (2004). In *Blakely*, this Court deferred consideration of the interplay between the Sixth Amendment and the Federal Sentencing Guidelines. This Petition and other Petitions pending before this Court ask this Court to squarely address that interplay.

2. Whether this Court's decision in *Blakely v. Washington*, 124 S.Ct. 2531 (2004) applies to the Federal Sentencing Guidelines and, if so, whether the Guideline provisions affected by *Blakely* can be severed or whether the Guidelines are unconstitutional *in toto*?

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Sean Patrick Micklin respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on February 19, 2004 and April 29, 2004. App. 1a;3a

OPINIONS BELOW

The opinions of the Court of Appeals for the Sixth Circuit were not recommended for full-text publication. *United States v. Micklin,* 89 Fed.Appx. 977 (6th Cir. 2004). They are reprinted in the appendix hereto ("App.") at 1a and 3a. Excerpts of the transcripts of the sentencing in the District Court are unreported and are reprinted at App. 29a .

JURISDICTION

The Sixth Circuit entered judgment in this case on February 19, 2004. App. 3a, and denied the Petitioner's request for Re-Hearing and Re-Hearing *en banc* on April 29, 2004. App. 1a. The jurisdiction of the District Court was based upon 18 U.S.C. 3231. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND SENTENCING GUIDELINES INVOLVED

The Sixth Amendment, as interpreted by *Blakely v. Washington*, 124 S.Ct. 2531 (2004), is involved and is included in the Appendix at 45a.

This case involves the following sentencing guidelines which are set forth in pertinent part at App. 45a - App. 47a. U.S.S.G. 2D.1.1(b)(5)(A)(ii); U.S.S.G. 2D1.1(c)(4); U.S.S.G. 2D1.1(c)(13); U.S.S.G. 2D1.1(c)(17); U.S.S.G. 3C1.1; Application Note 4 to U.S.S.G. 3C1.1; and U.S.S.G. 5A.

INTRODUCTION

This case presents the same question presented to this Court in *Blakely v. Washington*, 124 S.Ct. 2531 (2004), decided on June 24, 2004. The Petitioner's case is on direct appeal and the *Blakely* holding is thus applicable to this Petition. *Griffith v. Kentucky*, 479 U.S. 314 (1987).

The Petitioner had pled guilty to various drug-related crimes involving the manufacture of MDMA, commonly known as Ecstasy. At sentencing, three enhancements were used by the District Court to increase the Petitioner's sentence. The first enhancement related to drug quantity, pursuant to U.S.S.G. 2D1.1. The Respondent proposed that drug quantity be computed using a formula developed by the Drug Enforcement Administration. The formula assumed a particular level of efficiency in the manufacturing process and then converted the assumed quantities of chemicals into drug quantities. Those drug quantities were then used to determine the Petitioner's base offense level for sentencing purposes.

In the Petitioner's case, the Respondent also made assumptions about the quantities of chemicals purchased in order to make the conversion from chemicals to drugs. The Petitioner initially challenged the accuracy of this conversion process, but ultimately did not persist in his objection at sentencing. The Petitioner never personally admitted that the quantity of drugs derived using the Respondent's formula was the amount of drugs for which he was responsible. The conversion formula resulted in a judicial finding that the Appellant was involved with the equivalent of 1,000 to 3,000 kilograms of marijuana equivalent and that his base offense level for purposes of the United States Sentencing Guidelines computation should be 32, pursuant to, U.S.S.G. 2D1.1(c)(4). App. 45a.

The indictment did not specify any particular quantity of drugs or any particular amount of chemicals. App. at 41a. The Petitioner's plea thus did not involve an admission to the quantity of drugs that was used to sentence him.

Among other things, U.S.S.G. 2D1.1(b)(5)(A)(ii) provides for a 2 level enhancement if the offense involved the unlawful disposal of hazardous waste. Following the execution of a search warrant at his home, the Petitioner had dismantled a laboratory that the police had not discovered because it was in a different location. The Petitioner then went to a public park and discarded the laboratory materials in a public dumpster. The materials were discovered the next morning by a park employee, who notified the authorities.

At sentencing, the district judge made a judicial finding of fact that the Petitioner's actions in discarding the laboratory materials including chemicals constituted an environmental risk and that the Petitioner's guidelines should be increased by 2 levels. App. 31a

The indictment did not charge the Petitioner for discarding the laboratory materials, and the Petitioner's plea thus did not admit that his actions created environmental risks. App. 41a.

U.S.S.G. 3C1.1 provides for an enhancement if a criminal defendant obstructs justice. At sentencing, the issue was whether the Petitioner's actions in discarding the laboratory materials constituted obstruction of justice. Application Note 4(d) to U.S.S.G. 3C.1.1 states that obstruction does not occur if the criminal defendant destroys evidence "contemporaneously with arrest". The Petitioner challenged this enhancement, arguing that his decision to dismantle the laboratory and to discard the materials was prompted by a search of his home and by his fear of imminent arrest. The district judge made a judicial finding of fact that the Petitioner

had obstructed justice and that his actions did not occur "contemporaneously with arrest". App. 32a.

The indictment did not charge the Petitioner with obstruction of justice, and the Petitioner did not otherwise admit that he had obstructed justice. App. 41a.

In *Blakely*, this Court held that facts which resulted in the enhancement of a criminal defendant's sentence must be found by a jury, and that a judge, in a determinate sentencing system, could not increase a criminal defendant's sentence using judicial fact-finding.

As set forth in more detail *infra*, the Circuit and District Courts have sharply split over the applicability of *Blakely* to the United States Sentencing Guidelines. Among the seminal concerns are whether *Blakely* applies to the Guidelines, and, if so, whether the Guidelines are unconstitutional *in toto* or whether any unconstitutional provisions can be severed.

The Second Circuit Court of Appeals has certified several questions to this Court, seeking clarification about how *Blakely* affects the United States Sentencing Guidelines. *United States v. Penaranda*, 2004 WL 1551369 (2d Cir. 7/12/04). Other petitioners have filed Petitions for Certiorari raising *Blakely* issues or have amended pending petitions to include the *Blakely* issue. *e.g., United States v. Booker*, 2004 WL 1638204 (7/21/04) Case No. 04-104; *United States v. FanFan*, 2004 WL 1638205 (7/21/04), Case No. 04-105; *Lee v. Alabama*, 2004 WL 1588300 Case No. 03-1520; *Stantini v. United States*, 2004 WL 1599381 Case No. 04-62;. *Mitrione v. United States*, 2004 WL 15252087 Case No. 03-1668.

This Court should hold this Petition in abeyance, pending a decision by this Court as to how this Court will proceed with the Second Circuit's request and/or with the other Petitioners who are seeking relief based upon *Blakely*'s

holding. Once that decision has been made, the Court should grant the petition, vacate the judgment below, and remand the case for further consideration in light of this Court's determinations regarding *Blakely's* applicability to determinate sentencing schemes which are similar to the State of Washington's sentencing scheme addressed in *Blakely*. In the alternative, the Court should grant the petition and decide the important question presented on which the courts of appeals are divided. *See*, S.Ct. Rule 10(a).

STATEMENT OF THE CASE

The police suspected that Sean Patrick Micklin, the Petitioner, was manufacturing MDMA, commonly known as Ecstasy, and distributing it by sending packages via United Parcel Service or other mailing services. In August of 2001, the police intercepted a package which the Petitioner had given to a mailing service to process. After a dog alerted to the package, it was searched. The package contained Ecstasy. The police thereafter obtained a search warrant and searched the Petitioner's home. The Petitioner became aware of the police activity because he had returned home during the execution of the search warrant.

The Petitioner had built a laboratory for the manufacture of Ecstasy which was at a location separate from his residence. Following the search of his home, and fearing imminent arrest, the Petitioner went to the other location, dismantled the laboratory, and discarded the laboratory materials, including chemicals, in a dumpster located in a public park. The materials were discovered the next morning by a park employee. The police were notified, and the authorities both searched the discarded materials and disposed of them after the search.

In February of 2002, a six count indictment was filed charging the Petitioner with various drug-related offenses. App. 41a to 44a.

The indictment did not specify the quantity of drugs which the Petitioner had allegedly manufactured, attempted to manufacture, or distributed. App. 41a to 44a. The indictment also didn't specify the quantity of drugs that could be manufactured with the laboratory materials which the Petitioner had allegedly possessed. App. 44a.

The Petitioner pled guilty to Counts One, Two, Three, and Five of the indictment, which had charged the Petitioner with attempted manufacture of MDMA, manufacture of MDMA, attempted distribution of MDMA, and possession of items with knowledge that they will be used to manufacture a controlled substance. App. 41a to 44a and 14a.

On July 18, 2002, the Petitioner was sentenced to 144 months on each of Counts One, Two, and Three and to 48 months on Count Five, all sentences to be served concurrently. App. 14a-28a.

The Petitioner was sentenced using the November, 2001 version of the United States Sentencing Guidelines. The sentencing factors ultimately used to calculate the Petitioner's sentencing range were drug quantity, environmental damage, obstruction of justice, and acceptance of responsibility. These calculations produced a total offense level of 33.[1] App. 14a,

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[1] The district court made a judicial finding that the Petitioner was responsible for 1,000 to 3,000 kilograms of marijuana equivalent or level 32, pursuant to U.S.S.G. 2D1.1(c)(4). App. 29a. The district court made judicial findings that 2 levels should be added for environmental damage, pursuant to U.S.S.G. 2D1.1(b)(5)(A)(ii), App. 31a, that 2 levels should be added for obstruction of justice, pursuant to U.S.S.G. 3C1.1, App, 32a, and

The district court departed downward one criminal history category on the grounds that the calculated criminal history score over-represented the seriousness of that prior history. App. 26a and 36a. The final calculated guidelines were 135 to 168 months, and the district court selected 144 months as the appropriate sentence within that range. App. 17a and 26a.

The minimum scoring for an undetermined amount of Ecstacy could arguably be Level 6 (the lowest level for marijuana) U.S.S.G. 2D1.1(c)(17) or Level 14 (the amount of drugs actually seized) U.S.S.G. 2.1.1(c)(13). If the aggravators are not scored based on *Blakely*, and if 2 levels are subtracted for acceptance of responsibility, the resultant total offense level would arguably be 4 or 12. This would produce a guideline ranges of 0-6 months or 12-18 months. U.S.S.G. 5A. This calculation would also mean that the Petitioner's sentence was increased by approximately 126-138 months based upon judicial findings made by the district court.[2]

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that 3 levels should be subtracted for acceptance of responsibility, pursuant to U.S.S.G. 3E1.1, App. 31a. These judicial findings mathematically led to the total offense level of 33.

[2] This approximation was made by subtracting the top of the arguable guideline ranges from the 144 month sentence the Petitioner actually received.

REASONS FOR GRANTING THE WRIT

I. This Case Presents the Same Issues That this Court Addressed on June 24, 2004 in *Blakely v. Washington,* 124 S.Ct. 2531 (2004). *Blakely* Applies to the Petitioner Because His Case Is on Direct Appeal. This Court Should Grant the Writ, Vacate the Decision of the Sixth Circuit and Remand for Consideration in Light of *Blakely*.

The issue presented in the Petitioner's case is identical to the issue addressed by this Court in *Blakely v. Washington*, 124 S.Ct. 2531 (2004). Specifically, the Petitioner's sentence was significantly enhanced based upon judicial findings of fact. The judicially-found facts were not alleged in the indictment, were not found by a jury, and were not admitted by the Petitioner.

The Sixth Circuit Court of Appeals did not consider *Blakely* when it decided the Petitioner's case because *Blakely* had not yet been decided. Indeed, the Sixth Circuit, like all other Circuits, had defined "statutory maximum sentence" differently from the definition announced by this Court in *Blakely*. *e.g. United States v. Baltas,* 236 F.3d 27 (1st Cir. 2001); *United States v. Garcia,* 240 F.3d 180 (2d Cir. 2001); *United States v. Williams*, 235 F.3d 858 (3d Cir. 2000); *United States v. Kinter*, 235 F.3d 192 (4th Cir. 2000); *United States v. Doggett*, 230 F.3d 160 (5th Cir. 2000); *United States v. Corrado*, 227 F.3d 528 (6th Cir. 2000); *United States v. Behrman*, 235 F.3d 1049 (7th Cir. 2000); *United States v. Aguaydo-Delgado*, 220 F.3d 926 (8th Cir. 2000); *United States v. Hernandez-Guardado*, 228 F.3d 1017 (9th Cir. 2000); *United States v. Heckard*, 238 F.2d 1222 (10th Cir. 2001); *United States v. Nealy*, 232 F.3d 825 (11th Cir. 2000); *In re Sealed Case*, 246 F.3d 696 (D.C. Cir. 2001). (all defining "statutory maximum sentence" in terms of the

maximum penalty set by Congress as opposed to the sentence which a judge can impose within that statutory maximum before making factual findings).

Blakely applies to the Petitioner because his case is still on direct appeal. *See*, *Griffith v. Kentucky*, 479 U.S. 314 (1987).

Because this case squarely presents the question addressed in *Blakely*, one option would be for this Court to grant the petition and remand this case to the Sixth Circuit for further consideration in light of *Blakely*. In the alternative, this Court could hold this case in abeyance pending the resolution of the numerous other petitions and the certified questions already pending before this Court.

As this Court recently observed, "the GVR order has, over the past 50 years, become an integral part of th[e] Court's practice, accepted and employed by all sitting and recent Justices." *See*, *Lawrence v. Chatter*, 516 U.S. 163 (1996). The most common of the "wide range of developments" in light of which this Court typically exercises its GVR authority is an intervening decision of this Court which the court below could not have fully considered, which could cause the lower court to reject a "premise" on which its ruling was based if given the opportunity for further consideration, and which could determine the "ultimate outcome of the litigation". *Id.* at 165-166. In criminal cases, such as this, this Court's practice of remanding cases in these circumstances is perhaps even more firmly rooted. *See, Stutson v. United States*, 516 U.S. 193 (1996).

A GVR order is plainly an option here: the Sixth Circuit could not have anticipated this Court's ruling in *Blakely*. The fundamental premise used to affirm the Petitioner's sentence was arguably rejected by *Blakely*. The fundamental assumptions used by the district court to calculate the

Petitioner's sentence were also arguably rejected by *Blakely*. The ultimate sentence was arguably, as in *Blakely*, unconstitutionally determined. Thus, if this Court agrees, a GVR order would be appropriate under this Court's well-established precedents.

II. In the Alternative, this Court Could Grant the Petition and Consider on the Merits Whether *Blakely* Applies to the United States Sentencing Guidelines And, If so, Whether the Guidelines Are Unconstitutional *in Toto* or Whether the Unconstitutional Sections Can Be Severed and/or Hold the Petition in Abeyance Pending the Resolution of *Blakey's* Scope by Answers to Certified Questions or Decision in Other *Blakely*-related Petitions.

Prior to this Court's decision in *Blakely*, every federal appellate circuit had defined the term "statutory maximum" in terms of the maximum penalty authorized by Congress. *See, citations, supra p. 8.*

In *Blakely*, this Court ruled that a different analysis was required. Specifically, Blakely had pled guilty in a Washington state court to kidnaping his wife. As part of the plea, Blakely had admitted to the elements of the second-degree kidnaping, domestic violence, and firearms charges to which he had pled guilty. He did not admit to any other facts.

The State of Washington has a determinate sentencing scheme. The charges carried a sentencing range of 49-53 months. However, a sentencing judge was authorized to impose a sentence above that range if that judge found "substantial and compelling reasons justifying an exceptional sentence". The judge ultimately increased the defendant's sentence to 90 months, based on a finding of "deliberate cruelty", a fact to which the defendant had not admitted.

This Court, relying on *Apprendi v. New Jersey,* 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002), held that a sentencing judge exceeds his or her "proper authority" when that judge "inflicts punishment that the jury's verdict alone does not allow".

This Court also opined that the principle it announced in *Blakely* applies whether the sentencing system requires the sentencing judge to find a specific fact, one of several specified facts, or any aggravating fact.

In a footnote, this Court noted that the United States had appeared as *amicus curiae* and had urged this Court to affirm. The United States had argued that there were no constitutionally significant differences between Washington's guidelines and the United States Sentencing Guidelines. This Court declined to express an opinion because the United States Sentencing Guidelines were not before the Court.

As to guilty plea cases, this Court stated that the prosecution "is free to seek judicial sentencing enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding".

In her dissent, Justice O'Connor, citing the United States Sentencing Guidelines and statutes from a number of states, opined that *Blakely* "casts constitutional doubt over them all". Justice O'Connor went on to state that the Federal Sentencing Guidelines are indeed "more vulnerable to attack". She further opined that the majority opinion in *Blakely* "suggests that the hard constraints found throughout chapters 2 and 3 of the Federal Sentencing Guidelines, which require an increase in the sentencing range upon specified factual findings, will meet the same fate." Justice O'Connor specifically cited U.S.S.G. 3C1.1 (obstruction of justice), one of the variables used to increase the Petitioner's sentence in the instant case.

In his dissent, Justice Breyer stated that he is uncertain about how *Blakely* could be distinguished as to the Federal Sentencing Guidelines. Justice Breyer also set forth a number of practical concerns that federal prosecutors face in the uncertain environment following *Blakely*. Justice Breyer called for further argument about his concerns so that more certainty can be attained about how *Blakely* affects other sentencing schemes.

On July 7, 2004, some 13 days after the *Blakely* decision, Judge Cassell, sitting in the District of Utah, invalidated the United States Sentencing Guidelines. *United States v. Croxford*, 2004 WL 1521560 (D. Utah, 2004). In *Croxford*, the district judge concluded that the guidelines were not severable because severance would not achieve Congress' intent. The Court considered the guideline calculation, as modified by excluding unconstitutional aggravators, and ultimately imposed a sentence within the guideline range.

Several Circuit Courts have addressed the impact of *Blakely* on the Federal Sentencing Guidelines. These decisions are not uniform and the extraordinary Circuit splits are another compelling reason for this Court to grant certiorari and to address the complex issues raised by thoughtful district judges such as Judge Cassell and by the various Circuit Courts.

On July 12, 2004, the Fifth Circuit decided *United States v. Pineiro*, 2004 WL 1543170 (5th Cir. 2004). In *Pineiro*, the defendant had been convicted by a jury with being involved in a marijuana and cocaine distribution conspiracy and with two substantive counts of drug possession with the intent to distribute. The defendant was sentenced according to the Federal Sentencing Guidelines. The defendant's sentence was enhanced based upon judicial findings regarding drug quantities and leadership.

The defendant appealed, and his appeal was pending when *Blakely* was decided. The Court's ultimate conclusion was that in the absence of an *en banc* determination or an on-point holding by this Court, it was required to adhere to settled law. In the Fifth Circuit, settled law was that the Guidelines were constitutional and that any sentence imposed by the Guidelines was permitted as long as that sentence did not exceed the maximum sentence established by Congress.

The Fifth Circuit candidly acknowledged that this Court might ultimately reach a different conclusion. The Fifth Circuit expressed the hope that this Court will resolve the uncertainty triggered by *Blakely* both for the Courts and for Congress.

The Seventh Circuit addressed the issue in *United States v. Booker*, 2004 WL 1535858 (7th Cir. 7/9/04), *certiorari petition pending*, 2004 WL 1638204 Case No. 04-104. In *Booker*, the defendant had been found guilty by a jury of a drug offense which carried a statutory minimum sentence of 10 years and a maximum sentence of life.

The defendant's sentence was enhanced by a judicial finding that the defendant was responsible for 566 grams of cocaine base over and beyond the amount of cocaine base necessarily found by the jury. There was an additional judicial finding that the defendant had obstructed justice. The judicial fact finding resulted in guidelines of 360 months to life and an ultimate sentence of 360 months.

The Court began its opinion by noting that *Blakely* had created an avalanche of activity as numerous defendants sought review of their sentences. The Court noted that only Congress and this Court can provide definitive guidance as to how the lower courts should proceed.

As did the Fifth Circuit, the Seventh Circuit opined that it was the definition of "statutory maximum" for *Apprendi*

purposes that created the Sixth Amendment concerns for the Federal Sentencing Guidelines.

Unlike the Fifth Circuit, however, the Seventh Circuit did not simply apply prior precedent and leave the impact of *Blakely* to a definitive decision by this Court. Rather, the Seventh Circuit took the analysis a step farther.

At the threshold, the Seventh Circuit could see no difference between the sentencing scheme used by the State of Washington and the sentencing regime implemented by the United States Sentencing Guidelines. The Sentencing Commission is fully accountable to Congress which can revoke or amend the guidelines as it sees fit, citing *Mistretta v. United States*, 488 U.S. 361, 377 (1989). The Seventh Circuit thus agreed with the views of the *Blakely* dissenters that the Federal Sentencing Guidelines were doomed after *Blakely*. Like those dissenters, the Seventh Circuit could find no constitutionally significant distinction between the Washington State sentencing system and the sentencing system mandated by the Federal Sentencing Guidelines.

The government had made the same argument to the Seventh Circuit that it had made to the Fifth Circuit, i.e. that "all the guidelines do is to regularize the discretion that judges would exercise in picking a sentence within a statutory range". The Seventh Circuit rejected that argument on the grounds that the "vices of the guidelines are thus that they *require* the sentencing judge to make findings of fact (and to do so using the wrong standard of proof)." (Emphasis in the original).

The government had also argued that cases such as *Edwards v. United States*, 523 U.S. 511 (1998) and *United States v. Watts*, 519 U. S. 148 (1997) and other cases decided by this Court had upheld the guidelines against constitutional challenge. The Seventh Circuit rejected that position,

reasoning that none of those challenges had implicated the Sixth Amendment. The Seventh Circuit also noted that none of the opinions in *Blakely* had cited *Edwards*.

The Seventh Circuit also noted that this Court had reserved any decision about the Federal Sentencing Guidelines to another day. Unlike the Fifth Circuit, the Seventh Circuit concluded that such a determination "perforce confides the issue to the lower federal courts for the first pass at resolution".

The Seventh Circuit also distinguished between allowing a sentencing judge to consider facts such as character, remorse, and health "and commanding him to make factfindings and base the sentence (within a narrow band) on them." The Seventh Circuit opined that the command is what was wrong with Washington State's sentencing system in *Blakely*.

The Seventh Circuit then noted that prior to judicial findings, the maximum sentence the judge could have imposed was 262 months. This maximum sentence was based on the quantity of cocaine base necessarily found by the jury and on the defendant's criminal history.

Based on its analysis, the Seventh Circuit concluded that the defendant had a constitutional right to a jury determination regarding the quantity of drugs and whether his conduct obstructed justice. The sentence was thus vacated and the cause was remanded for re-sentencing.

Because 262 months was an appropriate sentence prior to judicial findings, the Court opined that the imposition of a 262 month sentence would end the analysis as far as the defendant was concerned.

If the government sought a higher sentence, then a sentencing jury might be an option. The Seventh Circuit saw

no problem with electing such an outcome, although the Court acknowledged that there may be practical and legal issues about which the sentencing court would have to be mindful.

The Seventh Circuit also acknowledged that there was an issue about whether the unconstitutional aspects of the guidelines were severable or if, as argued by the government, the entire system of the guidelines "must fail". The Seventh Circuit stated that severability is an issue of legislative intent, citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). The Seventh Circuit declined to reach the severability controversy because the issue had neither been briefed nor argued as part of the instant appeal.

Because of the risk that the guidelines might be declared unconstitutional *in toto*, the Seventh Circuit stated that it would be prudent for the sentencing judge to impose a fall-back sentence.

Judge Easterbrook dissented on grounds similar to those advocated by the Fifth Circuit, reasoning that this Court should have the sole authority to set aside the Federal Sentencing Guidelines. Judge Easterbrook reasoned that the court's decision was its "own home-brewed formula and other courts are bound to favor different recipes as 900 district and circuit judges fumble for solutions. The Supreme Court alone can make a definitive judgment". Among other things, Judge Easterbrook believed that the guidelines were likely saved by *Edwards v. United States*, 523 U.S. 511 (1998) and that only this Court, as opposed to intermediate federal courts, could rule to the contrary. See, also, *United States v. Ward*, 2004 WL 1636967 (7th Cir. 7/23/04) (Affirming *Booker* and remanding for determinations of contested aggravators by a sentencing jury).

On July 12, 2004, the *en banc* Second Circuit addressed the controversy in *United States v. Penaranda*, 2004 WL

1551369 (2d Cir. 7/12/04). The *en banc* Court was unanimously of the view that prior to taking a position on the interplay between *Blakely* and the Federal Sentencing Guidelines, the Court should certify questions to this Court, pursuant to 28 U.S.C. 1254(2).

The Second Circuit acknowledged that this Court rarely answers general questions–such as whether *Blakely* applies to the Federal Sentencing Guidelines, citing *United States v. Mayer*, 235 U.S. 55, 66 (1914) and *Wisniewski v. United States*, 353 U.S. 901 (1957). Indeed, the last time that a certified question of this nature was answered was twenty-three years ago in *Iran Nat'l Airlines Corp. v. Marschalk Co.*, 450 U.S. 919 (1981).

As background, the Second Circuit noted that its first case involved a sentence imposed for a drug-related crime following a jury conviction. The jury returned a special verdict specifying the drug quantities which it had found (5 kilograms of cocaine an 1 kilogram of heroin). The sentencing judge, using a preponderance standard, determined that the sentence would be based on 20 kilograms of cocaine and 1,200 grams of heroin. These judicial findings of fact resulted in ultimate guidelines of 151-188 months. The sentencing judge over-ruled a defense objection to the quantity determinations and imposed a 151 month sentence.

The second case involved a plea to an indictment charging a conspiracy to distribute 5 kilograms or more of cocaine. During the plea colloquy, the defendant admitted to the 5 kilograms or more quantity. At sentencing, the judge determined that the conspiracy involved 2,900 kilograms of cocaine. Additional factfinding by the judge resulted in enhancements for managerial role and a firearm and a reduction for acceptance of responsibility. The ultimate

guidelines were 324-405 months, and the sentence imposed was 360 months.

Both appeals challenged the validity of the sentences imposed.

The Second Circuit framed the question in terms of whether the Sixth Amendment "prohibits a sentencing judge from finding facts, not reflected in the jury's verdict or admitted by the defendant, that form the basis for determining the applicable adjusted offense level under the administratively-promulgated federal Sentencing Guidelines". Since both defendants' sentences had been enhanced by judicial findings, each could be unconstitutional if *Blakely* applies to the Guidelines. The Second Circuit, however, was unsure whether a majority of this Court would extend *Blakely* to the Federal Sentencing Guidelines.

Among other things, the Court was concerned that "the distinct administrative provenance of the federal Sentencing Guidelines may place them outside of the ambit of the *Blakely* principle". The Court argued that the guidelines are not proscribed by statute but "are the equivalent of legislative rules adopted by federal agencies". The Second Circuit noted the apparent split between the Fifth and Seventh Circuit on this issue and used that split as the reason why the Second Circuit was trying to resolve the issue by certifying questions to this Court.

The Second Circuit opined that "[i]n sum, there are reasonable arguments both in favor and against the proposition that *Blakely* applies to the Sentencing Guidelines and reasonable questions (if it does so apply) about whether it prohibits judicial fact-finding that determines the applicable Guidelines sentencing range within an applicable statutory maximum", noting that the Justice Department had taken an

official position on July 2, 2004 that *Blakely* does not apply to the Guidelines.

Having said that, the Second Circuit justified the certified questions by noting that there have been 220,000 federal sentences imposed since *Apprendi* was decided and that there was "the prospect that many thousands of future sentences may be invalidated or, alternatively that district courts simply will halt sentencing altogether pending a definitive ruling by the Supreme Court". The Second Circuit went on to state that "[w]e are convinced that a prompt and authoritative answer to our inquiry is needed to avoid a major disruption in the administration of criminal justice in federal courts". Without such an authoritative answer, the Second Circuit envisioned courts sentencing under the guidelines as they have been doing since 1987 (essentially the Fifth Circuit's posture) or selecting alternative means for implementing *Blakely* (the Seventh Circuit's approach). Since both postures cannot be correct, this Court's ultimate decision could adversely affect literally thousands of defendants sentenced according to incorrect principles.

The Second Circuit observed that if any court concludes that *Blakely* applies to the Federal Sentencing Guidelines, "it is without guidance as to the means for achieving compliance". The Second Circuit identified 5 different approaches taken by different courts: (1) holding the guidelines unconstitutional but advisory–*United States v. Croxford*, 2004 WL 1521560 (D. Utah 2004); 2) Imposing a sentence following a guilty plea based only upon the facts admitted by the defendant–*United States v. Gonzalez*, 2004 WL 1444872 (S.D.N.Y. 2004); (3) Imposing sentence following a guilty plea by determining the guidelines based upon admitted facts, reducing that level by 2 levels for acceptance, and sentencing at the maximum for the range found by that calculation method–*United States v. Shamblin*,

2004 WL 1468561 (S.D.W.Va. 2004); 4) recalling the jury to determine whether the facts warranting the enhancement have been proven, *N.Y. Jury Convicts Moors,* Philadelphia Inquirer, July 2, 2004; and 5) imposing sentence on each count based on fact found by the jury and then running sentences consecutively to achieve the sentence that would have been imposed but for the constitutional issues–*United States v. Green*, 2004 WL 1381101 (D.Mass. 2004).

The Second Circuit expressed concern that some or none of these methods might ultimately pass muster, leaving defendants, the government, victims, and the public uncertain as to whether sentences imposed will ultimately be upheld.

The Second Circuit went on to certify three questions to this Court:

> "1. Does the Sixth Amendment permit a federal district judge to find facts, not reflected in a jury's verdict or admitted by a defendant that form the basis for determining the applicable adjusted offense level under the federal Sentencing Guidelines and any upward departure from that offense level?
>
> 2. In a case where a jury has convicted a defendant of possessing with intent to distribute five kilograms or more of cocaine and one kilogram or more of heroin, does the Sixth Amendment permit a federal district judge to determine, under the federal Sentencing Guidelines, the quantity of drugs for which the defendant is responsible and upon which his base offense level and corresponding sentencing range will be calculated, under U.S.S.G. 2D1.1? and
>
> 3. In a case where a defendant has pled guilty to conspiring to distribute five kilograms or more of cocaine, does the Sixth Amendment permit a federal district judge to determine, under the federal

> Sentencing Guidelines, (a) the quantity of drugs for which the defendant is responsible and upon which his based offense level and corresponding sentencing range will be calculated, under U.S.S.G. 2D1.1, (b) the applicability of a two-level enhancement to the base offense level for carrying a gun in connection with the offense, under U.S.S.G. 2D1.1(b)(1), and (c) the applicability of a three-level managerial role enhancement under U.S.S.G. 3B1.1(b)?"

The Second Circuit urged this Court to expedite its request and to allow an expedited briefing and hearing schedule.

On July 14, 2004, the Sixth Circuit faced the issue in *United States v. Montgomery*, 2004 WL 1562904 (6th Cir. 2004). In *Montgomery*, the defendant had pled guilty to bank fraud. The sentencing guidelines were determined by a judicial determination of the amount of money involved in the fraud. At sentencing, the district court also believed "that it was constrained by the mandatory nature of the Sentencing Table (Chapter 5) and Sections 5B1.1(a)(2) and 5C1.1(c)(2) of the Federal Sentencing Guidelines. Based upon these factors, the district court determined that the guidelines were 6-12 months and that a 6 month sentence was required. Based upon U.S.S.G. 5C1.1(c), one month was to be served in a halfway house and five months were to be served in home confinement.

As to *Blakely*, the Court held that the case made "a sea change in the administration of the Federal Sentencing Guidelines". The Sixth Circuit construed *Blakely* as holding that "determinate or fixed-rule bound sentencing, like the Federal Sentencing Commission's system, which increases sentences based on a requirement of judicial fact-finding, violates the trial-by-jury requirement of the Sixth Amendment. The Court held that a system that automatically

calibrates sentences from a grid or a table based on various factual elements as found by the judge encroaches on the fact-finding authority of juries under the Sixth Amendment." By contrast, the Sixth Circuit noted that indeterminate sentencing systems, as was the case with the federal system prior to 1987, do not violate the Sixth Amendment.

The Sixth Circuit then held that the Federal Sentencing Guidelines, after *Blakely*, "will simply become recommendations that the judge should seriously consider but may disregard when [the judge] believes that a different sentence is called for. The Court noted that its conclusion was consistent with an alternative position taken by the Justice Department in its official memorandum released on July 2, 2004.

On July 19, 2004, shortly after this published opinion was released, an Order was entered vacating the opinion, pending *en banc* review by the entire membership of the Sixth Circuit. 2004 WL 1562904 (6th Cir. 2004). On July 23, 2004, based on an agreed motion by the parties, the appeal was dismissed in its entirety. 2004 WL 1637660 (6th Cir. 2004). There is thus no remaining opinion from the Sixth Circuit regarding *Blakely* and the Guidelines.

In *United States v. Marseille*, 2004 WL 1627026 (11th Cir. 7/21/04), the Court concluded that *Blakely* did not apply to fact-finding decisions about a defendant's prior criminal history, even though that fact-finding resulted in the defendant being classified as a career criminal and thus subject to a much higher sentence than he would have received without that determination. *Marseille* implicitly concluded that the Guidelines were not unconstitutional *in toto* because the Court used the Guidelines to review the defendant's sentencing challenges.

In *United States v. Mooney*, 2004 WL 1636960 (8th Cir. 7/23/04), the defendant was convicted of various offenses involving insider trading. Among other things, the defendant's sentence was enhanced by a judicial finding of fact regarding the amount of loss attributable to his offense behavior. Also at issue were grouping rules and an enhancement based upon a judicial finding regarding the defendant's knowledge of a fraudulent scheme. After *Blakely*, the defendant filed a bond motion. The panel unanimously concluded that *Blakely* applied to the Federal Sentencing Guidelines. A majority of the panel concluded that the Federal Sentencing Guidelines were unconstitutional. The third member of the panel concluded that prior precedent of this Court had validated the guidelines and that *Blakely* did not overrule those prior decisions.

The Eighth Circuit, however, did not resolve this difference of opinion among the judges. Rather, the case was remanded to the district judge for re-sentencing and for consideration of the bond motion. The panel withheld the mandate and retained jurisdiction so that the case could be re-appealed and re-visited once the district court had acted.

In *United States v. Ameline*, 2004 WL 1635808 (9th Cir. 7/21/04), the defendant admitted to only trace amounts of drugs. At sentencing, the district judge made factual findings about the amount of drugs involved, determined that 1,603.6 grams of methamphetamine were involved in the defendant's offense behavior, and imposed a 150 month sentence.

The Ninth Circuit concluded that although *Blakely* applied, *Blakely* did not invalidate the Federal Sentencing Guidelines. Since the defendant's sentence had been enhanced based upon a judicial finding rather than upon the defendant's admissions or a jury finding, the cause was remanded to the district judge for re-sentencing.

At the threshold, the Ninth Circuit reasoned that the sentencing process under the Guidelines and as used in the case before it mirrored the sentencing procedure found wanting in *Blakely*. The Ninth Circuit rejected the government's argument that the Guidelines are unaffected by *Blakely* because they are not "legislatively enacted" but a special delegation of authority. The Court reasoned that simply inserting the Sentencing Commission into the mix did not change the reality that the ultimate authority regarding the Sentencing Guidelines belongs to Congress.

The Ninth Circuit also rejected the argument that previous decisions of this Court, such as *Edwards v. United States*, 523 U.S. 511 (1998) and other cases upholding the Guidelines against constitutional challenges, meant that *Blakely* did not render the Guidelines unconstitutional. Siding with the Seventh Circuit's decision in *Booker*, the Court noted that none of the cases involving the Guidelines raised a Sixth Amendment challenge.

The Ninth Circuit, differing from the Fifth Circuit in *Piniero*, held that it was not bound by prior Circuit authority regarding the sentencing guidelines because that authority had not ruled about a Sixth Amendment challenge to the Guidelines.

For these reasons, the Ninth Circuit concluded that *Blakely* applies to the United States Sentencing Guidelines. As to the meaning of that decision, the Ninth Circuit concluded that the Guidelines were severable. The Ninth Circuit noted that its ruling does not affect the determination of the base offense level or enhancements not invalidated by *Blakely*. The Ninth Circuit stated "although these procedural aspects of applying the Sentencing Guidelines violate [the defendant's] Sixth Amendment right to a jury trial, they are severable." The Ninth Circuit applied a presumption of

severability, citing this Court's decision in *Regan v. Time*, 468 U.S. 641 (1984). The issue is also one of legislative intent, citing this Court's decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

The Ninth Circuit then stated that Congress had three objectives in mind when it enacted the Federal Sentencing Guidelines: 1) honesty in sentencing by eliminating the indeterminate sentencing system which allowed defendants to serve far less time than the sentence imposed by the district judge; 2) uniformity in sentencing by narrowing the wide disparity in sentencing for defendants whose offenses and criminal histories were essentially the same; and 3) proportionality in sentencing by treating different criminal conduct differently. In sum, Congress' purpose was to eliminate the uncertainty that went with indeterminate sentencing.

In the Ninth Circuit's opinion, severance only changes how facts are determined and by whom. The Court further opined that this type of change did not impinge upon Congressional purpose. For these reasons, even though the Guidelines will function differently after *Blakely*, it was the Court's opinion that severance promoted rather than undermined Congress' intent.

After remand, the Ninth Circuit instructed that if the government chose to prove drug quantity and firearm related issues, a sentencing jury should be convened where these matters would have to be proven beyond a reasonable doubt.

A dissenting judge argued that the Guidelines were unaffected by *Blakely*, agreeing with the Fifth Circuit's opinion in *Piniero* and Judge Easterbrook's dissent in *Booker*.

In addition to the district court decisions identified by the Second Circuit in *Penaranda*, *supra*, numerous other cases have been decided as district courts are sentencing defendants

in a post-*Blakely* environment. As examples: *United States v. Leach*, 2004 U.S. Dist. Lexis 13291 (E.D.Pa. 7/13/04) (Guidelines not unconstitutional *in toto* and can be applied as severed); *United States v. Toro*, 2004 WL 1575325 (D.Conn. 7/8/04) (same); *United States v. King*, Case No. 6-04-CR-35 (M.D.Fl. 7/19/04 (Guidelines unconstitutional *in toto*); *United States v. Eintsman*, 2004 WL 1576622 (E.D. N.Y. 7/14/04) (same); *United States v. Marraro*, 2004 WL 1621410 (S.D.N.Y. 7/21/04) (same); *United States v. Khan*, 2004 WL 1616460 (E.D.N.Y. 7/20/04) (Guidelines not unconstitutional and sentencing juries can be used to comply with *Blakely*); *United States v. Harris*, 2004 U.S. Dist. Lexis 13290 (W. D. Pa. 7/16/04) (*Blakely* does not apply to the Guidelines); *United States v. Olivera-Hernandez*, Case No. 2:04-CR-13 (D. Utah, 7/12/04) (same); *United States v. Byrd*, 2004 WL 1618832 (W.D.Tex. 7/20/04) (same); *United States v. Wada*, 2004 WL 1488695 (D. Or. 6/29/04)(*Blakely* applies to the guidelines, but judge was allowed to make a factual finding that benefitted the defendant despite *Blakely*); *United States v. Medas*, 2004 WL 1498183 (E.D.N.Y. 7/1/04) (*Blakely* applies to guidelines, but jury which found guilt would not be allowed to make sentencing-related findings when sentencing issues not part of trial); *United States v. Burrell*, 2004 WL 1490246 (W.D.Va. 7/6/04) (*Blakely* does not invalidate guidelines and it is appropriate for the sentencing judge to make factual findings about the defendant's criminal history, including classifying the defendant as a career offender); *United States v. Montgomery*, 2004 WL 1535646 (D. Utah, 7/8/04) (*Blakely* applies to the guidelines but the guidelines are severable and a sentencing judge can sentence using calculations excluding unconstitutional enhancements; rejecting fellow-district judge's opinion in *Croxford*).

In sum, there is a wide divergence among the federal courts regarding the impact of *Blakely* on the Federal

Sentencing Guidelines. As set forth *supra*, a panel in the Sixth Circuit and a panel in the Eighth Circuit have opined that the Guidelines are unconstitutional. A panel in the Ninth Circuit found that *Blakely* applied and that any unconstitutional Guideline sections can be severed. An Eleventh Circuit panel seemed to reach the same result by implication. The Fifth Circuit has held that *Blakely* does not apply to the Guidelines. A panel from the Seventh Circuit concluded that the Guidelines applied, but reserved a decision on severability. Another Seventh Circuit panel remanded for a sentencing jury. An *en banc* Second Circuit certified the issue to this Court. District courts, which are making the day-to-day decision, are widely split, with some declaring the Guidelines unconstitutional and non-severable, some declaring that the Guidelines were unaffected by *Blakely* and others sentencing without applying aggravators deemed unconstitutional.

Because the Petitioner's case is directly on-point to the controversy going on in the federal circuit and district courts, because Petitioner's case is on direct review, and because the split among federal jurists is deep and extraordinary, this Court should either grant certiorari and address the Petitioner's case on the merits or, alternatively, hold the Petitioner's case in abeyance until this Court addresses the certified questions or other pending petitions which are based upon the interplay between the Federal Sentencing Guidelines and *Blakely*.

As to the specifics, the Petitioner submits that the Federal Sentencing Guidelines are squarely within the ambit of the *Blakely* decision. As panels in the Sixth, Seventh, Eighth, Ninth, and Eleventh Circuit and the dissenters in *Blakely* opined, the Federal Sentencing Guidelines are a determinate sentencing system that, prior to *Blakely,* used judicial fact-

finding and a preponderance of the evidence standard to dramatically increase a criminal defendant's sentence.

In the Petitioner's own case, judicial findings about drug quantities, environmental hazards, and obstruction of justice increased his sentence from a possible range of 0-6 months to 144 months. The indictment alleged none of these aggravators, the Petitioner's plea involved no necessary admission about any of these factors, and the Petitioner did not personally admit to any facts which would necessarily support the aggravators.

Petitioner believes that the Courts that have held that the Guidelines apply to the Federal Sentencing Guidelines are correct and that as a result, the eight to twelve-fold increase in the Petitioner's sentence violated the Sixth Amendment. The Fifth Circuit's contrary holding in *Piniero* was really not substantive. Rather, it was a refusal to make a decision, leaving the difficult analysis to either this Court or the *en banc* Fifth Circuit Court.

The Petitioner also submits that the Ninth Circuit was correct when it concluded that any unconstitutional Guideline provisions could be severed without doing violence to the reasons why Congress passed the Sentencing Guidelines. As the Ninth Circuit held in *Ameline* and the Seventh Circuit held in *Ward* and *Booker*, a sentencing jury can be employed with respect to disputed factual issues that had not been previously determined by a jury. Alternatively, as those cases also held, a criminal defendant could be sentenced using only those factors which had been found by a jury or admitted to by the defendant.

It is the Petitioner's position that the Ninth Circuit was also correct when it reasoned that the impact of *Blakely* on the Sentencing Guidelines was only a change about who makes decisions (jury versus judge) and about the standard to be

used to make factual findings (preponderance of evidence versus beyond a reasonable doubt). Using the Ninth Circuit's reasoning, the rest of the Federal Sentencing Guideline structure remains intact and the goals of Congress–honesty in sentencing, avoidance of disparities, and different treatment for different facts–can be achieved by interpreting the Sentencing Guidelines in a way which complies with the Sixth Amendment.

For purposes of review by this Court, however, the issues of whether *Blakely* applies to the Federal Sentencing Guidelines, and, if so, whether the Guidelines are or are not severable are present, even though reasonable jurists and lawyers might disagree as to how those very difficult issues should be resolved.

Thus, even though there is disagreement about all of these issues, the reality of the controversy and the apparent chaos among federal jurists supports a decision by this Court to grant certiorari and to hear Petitioner's case on its merits. The commonality of the issues and the wide differences of opinion would also support a decision to grant certiorari in more than one case so that this Court could have the benefit of a wider range of argumentation and reasoning before making its decision in this case.

In sum, this Court should grant certiorari to resolve the conflict among the Circuits and the ever-burgeoning conflict among sentencing judges as to the interplay between *Blakely*, the Sixth Amendment, and the Federal Sentencing Guidelines.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari. Alternatively, this Court could hold the Petitioner's case in abeyance until a decision is made about the interplay between *Blakely* and the Federal Sentencing Guidelines. Once a decision is reached, the petition should be granted, the judgment vacated, and the case remanded for further consideration in light of this Court's decision.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 02-1976

[Filed April 29, 2004]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)
SEAN PATRICK MICKLIN, Defendant-Appellant.	)

BEFORE: MARTIN and MOORE, Circuit Judges; and WEBER,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

* Hon. Herman J Weber, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case, Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 02-1976

[Filed February 19, 2004]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SEAN PATRICK MICKLIN,
Defendant-Appellant.

BEFORE: MARTIN and MOORE, Circuit Judges; and WEBER,* District Judge.

OPINION

KAREN NELSON MOORE, Circuit Judge. Defendant-Appellant Sean Patrick Micklin ("Micklin") appeals the sentence imposed on him by the United States District Court for the Western District of Michigan pursuant to the 2001 United States Sentencing Guidelines ("U.S.S.G."), resulting

* Hon. Herman J Weber, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

from his conviction for various drug offenses. Micklin argues on appeal that the district court erred when it increased his offense level two points for obstruction of justice under U.S.S.G. § 3C1.1. Because we believe that Micklin's conduct warranted an enhancement for obstruction of justice, the judgment of the district court is AFFIRMED.

I. BACKGROUND

State authorities began an investigation into Micklin's manufacturing of 3,4-Methylenedioxy Methamphetamine ("MDMA") in October 2000, when it was discovered that he was ordering chemicals from various supply houses around the country. On August 1, 2001, authorities retrieved a package sent by Micklin to an address in Oregon. After inspecting the package pursuant to a search warrant, authorities discovered a pill bottle of capsules containing white powder later determined to be 3,4-Methylenedioxy Amphetamine ("MDA").

A search of Micklin's home pursuant to a warrant was conducted the same day. Authorities found 6.1 grams of powder MDMA, 25,000 empty capsules, a number of documents relating to the manufacture of ecstasy (including drug recipes and articles), as well as computer records detailing multiple purchases of chemicals and laboratory equipment. Although Micklin arrived home during the search, he was not arrested.

After the search ended, Micklin immediately left his home and went to his drug laboratory, located elsewhere. He proceeded to dismantle the laboratory in the middle of the night and then took the chemicals and equipment to a dumpster at the Texas Township Park located near his mother's house, where he proceeded to dispose of the

materials. Early the next morning, officers responded to a call from a park maintenance worker who had discovered the dumped materials. Many of the items contained information identifying Micklin as their owner. The authorities later used the computer records and results of subpoenas to chemical and laboratory equipment manufacturers to establish the history of chemicals and equipment purchased by Micklin to manufacture MDMA and MDA.

A six-count indictment was issued on February 28, 2002, the charges of which all centered around Micklin's alleged drug manufacturing of MDMA and MDA. On April 24, 2002, Micklin entered guilty pleas to Counts One, Two, Three, and Five.[1] A presentence investigation report ("PSR") was prepared, which recommended an upward adjustment for obstruction of justice. In making this recommendation, the PSR stated the following:

> Following the service of a search warrant at his residence, Mr. Micklin disposed of laboratory equipment and chemicals, both items material to the criminal investigation into his drug manufacturing. Such disposal in a dumpster was tantamount to the destruction or concealment of evidence in the case. This conduct is one example of obstructive behavior during the course of the investigation that warrants an enhancement pursuant to U.S.S.G. § 3 C 1.1.

J.A. at 91. Micklin objected to the scoring of a two-level upward adjustment for obstruction of justice pursuant to

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[1] Although there was no written plea agreement, the government orally agreed to move to dismiss Counts Four and Six at sentencing.

U.S.S.G. § 3C1.1, arguing that his conduct fell within an exception to the sentencing guideline. At the sentencing hearing, the district court overruled Micklin's objection to the obstruction of justice enhancement for his acts of attempting to destroy evidence, finding that the exception in U.S.S.G. § 3C1.1 did not apply. Micklin was then sentenced.[2]

II. ANALYSIS

We recognize the uncertainty surrounding the standard of review that controls when we are reviewing a district court's application of U.S.S.G. § 3C1.1. This confusion became extensive after the Supreme Court's decision in *Buford v. United States,* 532 U.S. 59 (2001), in which the Supreme Court called for greater deference when reviewing a district court's application of a sentencing guideline where the legal decision was "fact-bound [in] nature." *Id.* at 66. Since that time, various of our opinions have embraced differing standards of review. In our first published case on § 3C1.1 after *Buford, United States v. Middleton,* 246 F.3d 825, 845-46 (6th Cir. 2001). we applied a tripartite standard of review of a district court's application of § 3C 1.1. "First, we review the district court's findings of fact underlying the enhancement for clear error. Second. a district court's conclusion that a given set of facts constitutes obstruction of justice is a mixed question of law and fact that we review de novo. Finally, once a district court has determined that a defendant has obstructed justice, then application of a two-level enhancement at that point is mandatory, and we review the enhancement de novo." *Id.* at 846. However, in *United*

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[2] Micklin's guideline range was deemed to be 135-168 months, and he was sentenced to 144 months of incarceration, followed by three years of supervised release, restitution of $3,079.92, and a special assessment of $400.

States v. Jackson-Randolph, 282 F.3d 369 (6th Cir. 2002), we held that in light of *Buford,* a clear-error standard of review was "appropriate for reviewing sentencing decisions under § 3C1.1 where the sole issue before the district court is a fact-bound application of the guideline provisions." *Id.* at 390. Recently, in *United States v. Camejo,* 333 F.3d 669 (6th Cir. 2003), we reverted back to the tri-partite standard of review set forth in *Middleton. Id.* at 674-75. In the instant case, we need not decide which standard is the correct one for reviewing the district court's application of U.S.S.G. § 3C1.1, because the district court's decision to enhance Micklin's sentence was correct under either standard.

U.S.S.G. § 3C 1.1, titled "Obstructing or Impeding the Administration of Justice," provides, "If (A) the defendant willfully obstructed o1 impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels."[3] U.S.S.G. § 3C1.1.

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[3] [T]he obstruction adjustment applies where a defendant engages in obstructive conduct with knowledge that he or she is the subject of an investigation or with the 'correct belief' that an investigation of the defendant is 'probably underway.'" *United States v. Brown,* 237 F.3d 625,628 (6th Cir. 2001) (quotations omitted). There is no dispute that Micklin knew an investigation had commenced when he attempted to destroy his laboratory and other materials, as he had come home while authorities were conducting the search of his home.

Application Note 4 provides a "non-exhaustive list of examples of the types of conduct to which [U.S.S.G. § 3C1.1] applies." U.S.S.G. § 3C1.1, Application Note 4. Subsection 4(d) specifically includes:

> destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender.

U.S.S.G. § 3C1.1, Application Note 4(d). As the Application Note makes clear, unsuccessful attempts at destroying or concealing evidence still fall within the mandate of U.S.S.G. § 3C1.1. *United States v. Waldon,* 206 F.3d 597, 608 (6th Cir. 2000).

The district court characterized the obstruction of justice enhancement as a "tough issue." J.A. at 75. However, it felt the exception provided in Application Note 4(d) was a narrow one, given the example of an exception provided by the Note, i.e., "attempting to swallow or throw away a controlled substance." The district court also noted that in its legal research, it had not come across any cases defining the phrase "contemporaneously with arrest." The court felt this was not

a case falling within the 4(d) exception for the following reasons:

> But here is the difference. Here is the difference. It wasn't in the presence of the agents, and it wasn't while the agents were there. It's a situation that occurred after the search .... But I think that case that the government cited, *United States v. VanShutters,* is plenty close... – where the enhancement was warranted where he tried to destroy evidence at his house after he had been arrested. He allegedly directed someone to destroy the evidence, and he denied it, but the Court believed the other witness.
>
> And here, after [Micklin] knew about the search, he went elsewhere- in other words, it's a thoughtful act -- to destroy all of the evidence that would have shown his laboratory manufacturing this product. Now, lo and behold, they find it in a dumpster because it's reported by someone else. But I think that's different from the application note that talks about somebody doing something in the immediate presence of the officer while the officer is on top of him, so to speak.
>
> * * * * *
>
> Here, the act was to destroy or conceal evidence that is material -- it was the lab and a lot of chemicals --to an official investigation or judicial proceedings. He did it after the search of his apartment or house. And it says "attempting to do so," so it doesn't have to be successful, because an attempt would not materially hinder the official investigation.

> I'm going to overrule the objection on the enhancement. I think that he had time to think about it. It did not occur contemporaneously with his arrest. And the only reason it didn't hinder the investigation was the fact that it was discovered by an unrelated party, the person that saw it in the dumpster, who was not a law enforcement officer but who reported it to a law enforcement officer. So I don't think that the exception applies.

J.A. at 68-69, 76.

On appeal, Micklin argues that he falls within the "contemporaneously with arrest" exception noted in Application Note 4(d). Specifically, he argues that the district court read the exception too narrowly when it "concluded that since the evidence was not discarded when officers were present, the contemporaneously with arrest exception did not apply to [Micklin]." Appellant's Br. at 8. Micklin contends that the facts of this case "present a case of first impression in this Circuit because he has located no published case that deals with a defendant who is confronted by officers executing a search warrant, a defendant who could reasonably and objectively believe that his arrest is imminent, a defendant who panics, a defendant who thereafter discards evidence, and a defendant whose actions do not materially hinder the investigation." Appellant's Br. at 13. Micklin argues that this set of facts "closely resembles the guideline examples" (attempting to swallow or throw away a controlled substance), because there, as here, the situation involves "acts committed by a defendant who has not yet been arrested, who is panicking in the face of likely arrest, and who reacts in a knee-jerk fashion to destroy evidence." Appellant's Br. at 14. He further contends that his situation is similar to that in *United States v. Perry*, 991 F.2d 304 (6th Cir. 1993), where

the court found the "contemporaneously with arrest" exception to apply to a defendant who attempted hurriedly to conceal evidence via a third party when he discovered that authorities were at the front door. *Id.* at 311.

Although there do not appear to be any cases dealing with this particular set of facts, the cases that do exist lend support to the conclusion that Micklin is not entitled to the "contemporaneously with arrest" exception. On the one hand, there are clear-cut cases where the defendant attempts to destroy evidence as police are literally banging on the door. In these cases, the "contemporaneously with arrest" exception has applied so as to prevent application of the obstruction of justice enhancement. For example, in *Perry,* the defendant robbed a bank and fled to a relative's home. "When the police arrived, [the defendant], in an apparent effort to hide the bank robbery proceeds, tossed the money into a box and shoved the box against a wall." *Id.* at 307. His offense level was enhanced under U.S.S.G. § 3C 1.1 for these actions. On appeal, the defendant argued the district court erred when it increased his offense level. We agreed, finding that the "hurried attempt to conceal the evidence as the police stood at the front door was 'contemporaneous with arrest'...." *Id.* at 312.

On the other hand, there exists a line of cases where a defendant, subsequent to his or her arrest, attempts to get rid of evidence through the use of a third person. In these cases, the "contemporaneously with arrest" exception has not applied, and the defendant's sentence has been enhanced for obstruction of justice. For example, in *Waldon,* a defendant's sentence was enhanced for obstruction of justice when, after robbing a bank and being arrested, he contacted the owner of the car he had used for his getaway, and asked the owner to file a false police report that the car had been stolen so as to

create a defense for the defendant. 206 F.3d at 602. On appeal, the defendant argued that his conduct fell within the "contemporaneously with arrest" exception. We, however, disagreed, and instead approved the district court's finding that the defendant "made the telephone call at issue.., six hours after his arrest," and that therefore, "[his] actions were not an immediate attempt to jettison or hide inculpatory evidence that occurred at or near the time of his arrest." *Id.* at 608-09. *See also United States v. Van Shutters,* 163 F.3d 331,333-34, 339-40 (6th Cir. 1998) (obstruction of justice enhancement affirmed where, after his arrest, the defendant contacted a third party to dispose of incriminating evidence related to the case).

We conclude that the district court did not err when it applied the obstruction of justice enhancement to Micklin's sentence. We believe this situation is more akin to the *Waldon* and *Van Shutters* line of cases. Micklin would like us to analogize the execution of a search warrant to an arrest, and hold that his act of attempting to destroy evidence occurred contemporaneously with the execution of the search warrant, and therefore he should be entitled to the exception. However, we need not decide that issue, as his conduct did not occur contemporaneously with the search, because he disposed of the evidence at least several hours after the search had ceased. The timeline of events also demonstrates that Micklin's conduct was not a panicked reaction, but a thoughtful act. Finally, Micklin's actions clearly constitute an obstruction of justice, as they fall within the literal language of the examples of conduct given under U.S.S.G. § 3C1.1, Application Note 4.

II. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
Western District of Michigan

Case Number 1:02:CR:51-01

[Filed July 18, 2002]

UNITED STATES OF AMERICA,
Plaintiff,

v.

SEAN PATRICK MICKLIN,
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Richard D. Stroba
Defendant's Attorney

THE DEFENDANT:

_X_ pleaded guilty to Counts One, Two, Three and Five.

___ pleaded nolo contendere to Count(s) which was accepted by the court.

___ was found guilty on Count(s) after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title and Section	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 846, 841 (a)1 and (a)(1)(C)	Aug. 1, 2001	One
21 U.S.C. § 841(a)(1) and (b)(1)(C)	Aug. 1, 2001	Two
21 U.S.C. §§ 846, 841 (a)(1) and (b)(1)(C)	Aug. 1, 2001	Three
21 U.S.C. § 843 (a)(6)	Aug. 1, 2001	Five

Nature of Offense:

Count One: Attempted Manufacture of 3,4-Methylenedioxy Methamphetamine (MDMA/ "Extacy")

Count Two: Manufacture of 3,4-Methylenedioxy Amphetamine (MDA)

Count Three: Attempted Distribution of MDA

Count Five: Possession of Items with Knowledge that items will be Used to Manufacture a Controlled Substance

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on Count(s).

_X_ Counts Four and Six are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Judgment: July 18, 2002

Defendant's Soc. Sec. No.: 368-90-4628
Defendant's Date of Birth: August 30, 1969
Defendant's US Marshal's No.: 10827-040

Defendant's Address:
637 Denner Street
Kalamazoo, MI 49006-3113

Dated: July 18, 2002

/s/ _____
HON. GORDON J. QUIST
U.S. DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of one hundred forty-four (144) months on each of Counts One, Two, and Three, and a term of forty-eight (48) months on Count Five, to be served concurrently.

_X_ The court makes the following recommendations to the Bureau of Prisons:

The defendant participate in the residential 500 Hour Intensive Drug Treatment Program.

The Court would like the BOP to note defendant's medical skills.

The defendant be afforded appropriate psychological counseling.

The defendant participate in the Intensive Confinement Center Program (Boot Camp), provided he becomes eligible, desires to participate, and the Bureau of Prisons approves his participation.

_X_ The defendant is remanded to the custody of the Untied States Marshal.

___ The defendant shall surrender to the United States Marshal for this district

___ at __ a.m./p.m. on __.

___ as notified by the Untied States Marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

_____ before 2 p.m. on __.

___ as notified by the United States Marshal.

___ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant Delivered on _____ to _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Untied States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three (3) years. This term consists of terms of three (3) years on each of Counts One, Two, and Three, and one (1) year on Count Five, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenders qualifying for collection of a DNA sample pursuant to Section 3 of the DNA Analysis Backlog Elimination Act of 2000:

___ The defendant shall cooperate in the collection of DNA as directed by their probation officer.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests within 60 days.

___ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

For offenders convicted of a domestic violence crime defined in 18 U.S.C. § 3561(b):

___ The defendant shall attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50 mile radius of the legal residence of the defendant.

For offenders described in 18 U.S.C. § 4042(c)(4) who committed offenses after November 26, 1998:

___ The defendant shall report the address where they will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in the state where the defendant resides, is employed, carries on a vocation, or is a student.

_X_ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The Defendant shall comply with the standard conditions that have been adopted by this court and shall always comply with the special conditions of supervision set forth on the attached page(s).

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;

2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer at least fifteen days prior to any change in residence or employment;
7. the defendant shall refrain from any use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency with the permission of the court;
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and treatment for substance abuse as directed by the probation officer until such time as the defendant is released from the program by the probation officer and shall pay at least a portion of the cost according to his ability as determined by the probation officer.
The defendant shall refrain from all use of alcoholic beverages.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS:	$400.00 ($100 ea. count)	$	$3,089.92

___ The determination of restitution is deferred until ___. An Amended Judgment in a Criminal Case (AO 245C)

_X_ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	*Total of Loss	Amount of Restitution Ordered	Priority Order or Percentage Payment
Drug Enforcement Administration	$3,079.92	$3,079.92	
TOTALS	$3,079.92	$3,079.92	

___ If applicable, restitution amount ordered pursuant to plea agreement $_____

___ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

_X_ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

_X_ the interest requirement is waived for the ___ fine and/or _X_ restitution.

___ the interest requirement for the ___ fine and/or ___ restitution is modified as follows:

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ___ Lump sum payment of $_____ due immediately, balance due
___ not later than _____, or
___ in accordance with ___ C, ___ D, or ___ F below; or

B ___ Payment to begin immediately (may be combined with ___ C, ___ D, or ___ E below); or

C ___ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $_____ over a period of (e.g., months or years), to commence _ _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ___ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $_____ over a period of (e.g., months or years), to commence _

_____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E _X_ Special Instructions regarding the payment of restitution:

Payments shall be made from any wages defendant may earn in prison in accordance with the Bureau of Prisons Financial Responsibility Program. Any portion of the restitution that is not paid in full at the time of defendant's release from imprisonment shall become a condition of supervision.

Unless the court has any expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, 399 Federal Building, 110 Michigan, NW, Grand Rapids, Michigan 49503, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

___ Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

___ The defendant shall pay the cost of prosecution.

___ The defendant shall pay the following court cost(s):

___ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, and (2) restitution principal.

STATEMENT OF REASONS
(Not for Public Disclosure)

The court adopts the factual findings and guideline application in the presentence report.

OR

The court adopts the factual findings and guideline application in the presentence report except the Court found that the three level acceptance of responsibility applies (U.S.S.G. § 3E1.1(a) and (b)).

Guideline Range Determined by the Court:

Total Offense Level: 33
Criminal History Category: II
Imprisonment Range: 151 to 188 months
Supervised Release Range: 3 years (Cts. 1, 2, 3);
1 year (Ct. 5)
Fine Range: $17,500 to $3,250,000

Guideline Range After Departure:

Total Offense Level: 33
Criminal History Category: I
Imprisonment Range: 135 to 168 months

Supervised Release Range: 3 years (Cts. 1, 2, 3);
1 year (Ct. 5)
Fine Range: $17,500 to $3,250,000

_X_ Fine is waived because of inability to pay.

___ Fine is below the guideline range because of inability to pay.

Total Amount of Restitution: $3,079.92

Discretionary restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(a)(B)(ii) (or in offenses committed before April 23, 1996, pursuant to 18 U.S.C. § 3663(d)).

Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because the number of identifiable victims is so large as to make restitution impracticable, pursuant to 18 U.S.C. § 3663A(c)(3)(A).

Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because determining complex issues of fact and related to the cause of amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process, pursuant to 18 U.S.C. § 3663A(c)(3)(B).

For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to

be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

Partial restitution is ordered, pursuant to 18 U.S.C. § 3553(c), for the following reason(s):

___ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

___ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

_X_ The sentence departs from the guideline range:

___ upon motion of the government, as a result of defendant's substantial assistance, or

_X_ for the following specific reason(s): Defendant's criminal history was overstated because his prior misdemeanors were not indicative of a criminal state of mind and departed downwards to a Criminal History Category of I (U.S.S.G. § 4A1.3(e)).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:02CR51

UNITED STATES OF AMERICA,
Plaintiff,

v.

SEAN PATRICK MICKLIN,
Defendant.

Before

THE HONORABLE GORDON J. QUIST,
U. S. District Judge

Grand Rapids, Michigan
July 18, 2002
Sentence Proceedings

APPEARANCES:

MARGARET M. CHIARA, U.S. ATTORNEY
By: Raymond Beckering
5th Floor Law Building
330 Ionia N.W.
Grand Rapids, MI 49501-0208

On behalf of the Plaintiff;

BUTLER, DURHAM & TOWESON, PLLC
By: Richard D. Stroba
202 N. Riverview Dr.
Parchment, MI 49004-1310

On behalf of the Defendant.

DIANE C. CALSBEEK, COURT REPORTER
492 Federal Building
Grand Rapids, MI 49503

[p. 22]...memorandum.

THE COURT: All right.

Anything you want to say in response to that Mr. Stroba? Do you want to reply to anything Mr. Beckering has said?

MR. STROBA: Your Honor, we have not challenged, obviously, as the Court knows, the two-point enhancement for the environmental hazard. We believe that that does sufficiently deal with the increased sentence that he receives because of having dumped these chemicals where he did.

My only other comment would be that, as someone indicated, we start to have a cumulative effect of adding all these things together and resulting in, perhaps, a much higher sentence than would be otherwise anticipated under the guidelines. If he is given both obstruction of justice and the two points for environmental hazard, that's four points -- a four-level change, which is, as indicated, very significant at this particular defendant's level.

I believe that the guideline adequately addressed the environmental-hazard issue by upwardly enhancing by two levels, and we would ask the Court to make no additional adjustment for that purpose.

THE COURT: Thank you.

Let me take it from the bottom up. As far as the [p. 23] upward departure goes, I'm going to deny the government's request for an upward departure, recognizing that these chemicals can, under some circumstances be extremely dangerous to even people walking by within a few hundred feet. That didn't occur in this particular case; although, it was capable of having occurred. And I think that the upward enhancement of two points because he put these chemicals in the dumpster illegally adequately takes care of the -- that particular act, and that no additional enhancement would be necessary -- or, no additional upward adjustment would be necessary.

As far as the objection to the presentence writer's failure to give the defendant three points off for acceptance of responsibility, I grant that objection and sustain that objection; and he will be given three points off for acceptance of responsibility. As his lawyer, Mr. Stroba, said, he did everything right until he pled guilty and then went and got the

tattoo, which I will simply say: Stupid, stupid, stupid. It's something that only a young person would do, considering the circumstances, because what you did, Mr. Micklin, is, in essence, just flip your finger at the Court. And that's taken very, very seriously. In other words, you said, "Well, I pled guilty, but --" I'm not going to use the words, but you can put your own word in. "You" would be the second word. And that is not at [p. 24] that point in time accepting responsibility. Apparently, your lawyer got ahold of you, and maybe even your parents, and said, "You better stop that kind of attitude or you're going to get in big trouble." But I'll take that one act as just an immature act on your part; although, you're a mature person with a Master's Degree, which is not typical of people that come before me.

The obstruction is a tough issue. It's a tough issue. I haven't been given any case law by the parties on that particular enhancement that I have not already cited. I don't think the defendant gave me a cite. And the government gave me a cite which I repeated, and I didn't see any other case. I didn't do -- the parties usually do a thorough job. I do a fair amount of research on my own, and I keep a lot of cases, quite frankly. And I spent several hours on this. But for some reason, I didn't run across any case that defined the words "contemporaneously with the arrest." With arrest. But the example given, "attempting to swallow or throw away a controlled substance," leads me to believe that -- the exception started with the word "however" -- is a very narrow exception. And it even has an exception in the exception. In other words, it says doing that contemporaneously "unless it resulted in a material hindrance to the official investigation or prosecution," because most of those things that happen contemporaneously [p. 25] would not result in a material hindrance. In other words, if a person tries to swallow

something or even if he swallows something, they can find that out pretty quickly.

Here, the act was to destroy or conceal evidence that is material -- it was the lab and a lot of chemicals -- to an official investigation or judicial proceedings. He did it after the search of his apartment or house. And it says "attempting to do so," so it doesn't have to be successful, because an attempt would not materially hinder the official investigation.

I'm going to overrule the objection on the enhancement. I think that he had time to think about it. It did not occur contemporaneously with his arrest. And the only reason it didn't hinder the investigation was the fact that it was discovered by an unrelated party, the person that saw it in the dumpster, who was not a law enforcement officer but who reported it to a law enforcement officer. So I don't think that the exception applies. So that one is overruled.

Does that take care of everything pending in front of me?

MR. BECKERING: Criminal history, Your Honor.

THE COURT: Let me hear you on that. I just did another one of these yesterday.

MR. STROBA: Your Honor, in regard to the criminal [p. 26] history, it is our position that the two misdemeanors that he had in the 1990s, one of which I believe is eight years old, one of which is seven years old, related to abuse of alcohol one resulting in a reckless driving conviction, one resulting in an impaired driving conviction -- puts him in a Category II, which, I think, is greater than those offenses would necessarily reflect. He was given a long period of probation in the one case, 24 months, which results in it being used

here, along with the other one, which was 12 months. Fortunately, the impaired driving is not nearly as serious as operating under the influence. The guidelines don't talk about an impaired driving; although, I would candidly admit they talk about a drinking-and-driving offense not being a minor traffic violation like speeding or something like that where those are still criminal offenses.

However, putting him into a Criminal History Category II puts him in with people who might have far more serious crimes, assaultive crimes, things like that. And that was a separate problem, probably still was a problem, ultimately, in his involvement in this case in terms of substance abuse. But I think that the application note which gives an example of two misdemeanors, almost ten years, is very close and on point with regard to --

THE COURT: Tell me what application note that is again. I had it marked. It's 4A1.1 something, isn't it?

[p. 27] MR. STROBA: I believe so, Your Honor.

MR. BECKERING. 4A1.3.

THE COURT: 4A1.3. Okay. I've got it. It's 4A1.3(e), second paragraph.

MR. STROBA: Your Honor, it does talk about the fact that they're close, almost ten years old. These are seven and eight years old, so I guess they're closer to being ten years than closer than within the past five years. And the effect of that, of course, is to substantially raise the potential punishment, depending on where the Court ultimately determines the appropriate level to be, which appears to be

around Level 33. It does make a significant change in the potential sentence in this case.

I would ask the Court to find that in this case, given those two particular misdemeanors as relates to Mr. Micklin, that those do overstate the criminal history and to depart downward to Criminal History Category I.

THE COURT: Thank you.

MR. STROBA: Thank you.

THE COURT: Mr. Beckering?

MR. BECKERING: Again, Your Honor, this is a fairly discretionary call. However, I think I've laid out our position, that this does not fit within the example given in the policy statement about crimes committed ten years ago.

[p. 28] THE COURT: It says close to ten years.

MR. BECKERING: The problem with that, Your Honor, is that we're talking about an intervening period where there is no other crimes, and we know from the defendant's conduct that, within merely a few years, he's starting to manufacture controlled substances, at least from the second offense. And based on that, based on the fact that one of the crimes was committed while on probation, it is the government's position that a downward departure is not merited.

THE COURT. The guideline says:

"There may be cases where the Court concludes that a defendant's criminal history category Significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant

> will commit further crimes. An example might include the case of a defendant with two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. The Court may conclude that the defendant's criminal history was significantly less [p. 29] serious than that of most other defendants in the same criminal history category (Category II), and therefore consider a downward departure from the guidelines."

You can go up or down under this guideline. But -just bear with me a minute. Yesterday, I had a case where the -- very similar charges were on the defendant's record; although, they occurred closer to the time of the offense for which he was being sentenced, number one. Number two, they were consistent with a guy that was out of control. And number three, the instant offense or the offense for which I sentenced him was committed while he was on probation for one of those. So that's a situation that's different. I did not depart downward for him. That's relevant because judges try to be consistent in their judgments and treat people with similar backgrounds, having committed similar crimes, similarly so that you don't favor one group or another.

I'll grant a downward departure to Level I. The reason I'll do that -- it's a close call. Reckless driving is a serious offense. Impaired driving is not really relevant so much to the crime for which he's being committed -convicted here, and he probably didn't do much more there than many drivers on any particular day do, most of whom [p. 30] don't get caught. But he probably -- on the other hand, because so few people are caught for impaired driving, he probably did it a lot of other times where he didn't get caught. But it's not particularly indicative of a criminal state of mind, so I'll grant the request

for downward departure. That puts him in Criminal History Category I.

Let me just --is there anything else, Mr. Stroba?

MR. STROBA: Nothing else regarding the sentencing guideline computation, Your Honor.

THE COURT. You'll have a chance for allocution. I want to go through the guidelines.

MR. STROBA: Thank you.

THE COURT: Now, Mr. Micklin, sir, is there anything in here that has not been brought to my attention by your lawyer or the government that you want to bring to my attention?

THE DEFENDANT: No, Your Honor. There is not.

THE COURT: Okay. Mr. Beckering, is there anything more you want to bring to my attention, sir?

MR. BECKERING: Not on this topic, Your Honor.

THE COURT: Okay. Then the facts and circumstances under which sentence will be imposed are those set forth in the presentence report, except as I will go through this and change them.

The defendant stands convicted on five counts, in [p. 31] essence, manufacturing MDA or MDMA, Ecstasy, which would subject him to a term of incarceration of 20 years imprisonment and a fine of up to a million dollars on each count, except for Count 5, which is four years and a $250,000

fine. And Count 5 is possession with knowledge the items would be used to manufacture a controlled substance. In essence, the defendant is convicted as a manufacturer and distributor of Ecstasy, the so-called date-rape drug.

As set forth in the presentence report and agreed to by the parties, he has a Base Offense Level of 32.

The government does not want to press the weapons issue, as I understand it, Hr. Beckering?

MR. BECKERING: No, Your Honor. We stand by -- I did submit an independent investigation about that myself, and I'm satisfied that the facts as the presentence writer described them are accurate.

THE COURT: All right. There is a two-point enhancement under United States Sentencing Guideline 2Dl.l(a) (2) involving disposal of a hazardous waste as defined by the Resource Conservation and Recovery Act.

You agree with that, as I understand it, Hr. Stroba?

MR. STROBA: Yes, Your Honor.

THE COURT: He does not hit the safety valve. He has an adjustment -- no adjustment for role in the offense. Pursuant to paragraph 37, he has obstruction of justice. [p. 32] That's a plus two. So he has an opening offense level or an Adjusted Offense Level Subtotal of 36. Three points off for acceptance of responsibility, for a Total Offense Level of 33. Downward departure to Criminal History Category I. That does not entitle him to the safety valve. The law is pretty clear on that. That's a Zone [illegible]. 33 and I is 135 to 168 months incarceration, supervised release of -- do you have that?

It's three years, isn't it, Mr. Magnotta?

PROBATION OFFICER MAGNOTTA: Yes, it is, Your Honor, on the first three counts and one year on the Count 5.

THE COURT: All right. And then the fine range -I should have right here in front of me. 33 and I. It's $17,500 to $3.5 million or some fantastic number up there. And a special assessment of $100 on each count, for a $500 total.

MR. STROBA: Your Honor, I believe he pled to four counts.

THE COURT: He pled to four?

MR. STROBA: Counts 1, 2, 3 and 5.

THE COURT: All right. $400 then. Okay. Okay. Am I right in all that then, Mr. Beckering?

MR. BECKERING: You are, Your Honor. But if you were addressing all the sentencing topics, I think there may...

... [p. 50] MR. STROBA: We'll do the best we can.

THE COURT- Do the best you can. I don't have any objection to it, but I'm not going to start running the security of this building either.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the Defendant Sean Patrick Micklin is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 144 months on each of Counts 1, 2, 3 and a term of 48 months on Count 5, to be served concurrently.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years. This term consists of terms of three years on each of Counts 1 through 3 and one year on Count 5, to run concurrently.

Within 72 hours of release from the custody of the Bureau of Prisons, Defendant shall report in person to the Probation Office in the district to which Defendant is released.

While on supervised release, Defendant shall comply with the mandatory and standard conditions of supervision, including drug testing, no firearms, destructive devices or other dangerous weapons.

Additionally, Defendant shall comply with the following special conditions of supervision:

He shall participate in a program of testing and...

END OF EXCERPT

APPENDIX E

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

No. 1:02-CR-51

UNITED STATES OF AMERICA,
Plaintiff,

v.

SEAN PATRICK MICKLIN,
Defendant.

HON. GORDON J. QUIST

INDICTMENT

COUNT 1
(ATTEMPTED MANUFACTURE OF MDMA)

From in or about May, 2000 to on or about August 1, 2001, in Kalamazoo County, in the Western District of Michigan, Southern Division, the defendant,

SEAN PATRICK MICKLIN,

did knowingly, intentionally, and unlawfully manufacture 3,4-methylenedloxy methamphetamine (MDMA), commonly referred to as "Ecstacy," a Schedule I controlled substance.

21 U.S.C. § 846
21 U.S.C. § 841(a)(1)
21 U.S.C. § 841(b)(1)(c)

COUNT 2
(MANUFACTURE OF MDA)

From in or about May, 2000 to on or about August 1, 2001, in Kalamazoo County, in the Western District of Michigan, Southern Division, the defendant,

SEAN PATRICK MICKLIN,

did knowingly, intentionally, and unlawfully manufacture 3,4-methylenedloxy amphetamine (MDA), a Schedule I controlled substance.

21 U.S.C. § 841(a)(1)
21 U.S.C. § 841(b)(1)(c)

COUNT 3
(ATTEMPTED DISTRIBUTION OF MDA)

On or about August 1, 2001, in Kalamazoo County, in the Western District of Michigan, Southern Division, the defendant,

SEAN PATRICK MICKLIN,

did knowingly, intentionally, and unlawfully attempt to distribute 3,4-methylenedloxy amphetamine (MDA), a Schedule I controlled substance.

21 U.S.C. § 846
21 U.S.C. § 841(a)(1)
21 U.S.C. § 841(b)(1)(c)

COUNT 4
(POSSESSION WITH INTENT TO DISTRIBUTE MDMA)

On or about August 1, 2001, in Kalamazoo County, in the Western District of Michigan, Southern Division, the defendant,

SEAN PATRICK MICKLIN,

did knowingly, intentionally, and unlawfully possess with intent to distribute 3,4-methylenedloxy methamphetamine (MDMA), commonly referred to as "Ecstasy," a Schedule I controlled substance.

21 U.S.C. § 841(a)(1)
21 U.S.C. § 841(b)(1)(c)

COUNT 5
(POSSESSION OF ITEMS WITH KNOWLEDGE THAT ITEMS WILL BE USED TO MANUFACTURE A CONTROLLED SUBSTANCE)

From in or about May, 2000 to on or about August 1, 2001, in Kalamazoo County, in the Western District of Michigan, Southern Division, the defendant,

SEAN PATRICK MICKLIN,

did knowingly, intentionally, and unlawfully possess encapsulating machines, gelatin capsules, laboratory equipment, and chemicals intending, knowing, and having reasonable cause to believe that such items will be used to manufacture a controlled substance.

21 U.S.C. § 843 (a)(6)

COUNT 6
(MANUFACTURE OF MARIJUANA)

On or about August 1, 2001, in Kalamazoo County, in the Western District of Michigan, Southern Division, the defendant,

SEAN PATRICK MICKLIN,

did knowingly, intentionally, and unlawfully manufacture marijuana, a Schedule I controlled substance.

21 U.S.C. § 841(a)(1)
21 U.S.C. § 841(b)(1)(D)

A TRUE BILL

/s/ _____
GRAND JURY FOREPERSON

MARGARET M. CHIARA
United States Attorney
/s/ _____
RAYMOND E. BECKERING III
Assistant United States Attorney

APPENDIX F

CONSTITUTIONAL AND GUIDELINE SECTIONS INVOLVED

The Sixth Amendment to the United States Constitution states in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him...

U.S.S.G. 2D 1. l(a)(3)reads in relevant part:

(a) Base Offense Level (Apply the greatest):

(3) the offense level specified in the Drug Quantity Table set forth in subsection ©)...

U.S.S.G. 2D 1.1 (c)(4) reads in relevant part:

Level 32

At least 1,000 KG but less than 3,000 KG of Marijuana

U.S.S.G. 2D 1.1 (b)(5)(A)(ii) reads in relevant part:

If (A) the offense involved ...the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

U.S.S.G. 3C 1.1 reads in relevant part:

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (I) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase by 2 levels.

Application Note 4 to U.S.S.G. 3C1.1 reads in relevant part:

The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:

(D) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceedings (e.g. shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempt to do so; however, if such conduct occurred contemporaneously with arrest (e.g. attempting to swallow or throw away a controlled substance), it shall not standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;

U.S.S.G. 2D1.1(b)(5)(A)(ii) reads

If the offense involved...the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

U.S.S.G. 2D1.1(c)(13) reads in relevant part:

Level 14

At least 5KG but less than 10 KG of Marijuana

U.S.S.G. 2D1.1(c)(17) reads in relevant part:

Level 6

At least 250 G of Marijuana

U.S.S.G. 5A reads in relevant part:

Level 12, Criminal History Category II
12-18 months

Level 4, Criminal History Category II
0-6 months